tion, and B had insured against pressure of the fill, and the question was which party should bear the loss. It is a contract case and must be determined by principles of contract liability. For the purpose of determining this question, no better statement of principles can be found than that laid down in the citation from the work of Mr. Justice Holmes in respondent's brief, as follows:

> "As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary. What the event contemplated by the promise is—or, in other words, what will amount to a breach of contract—is a matter of interpretation and construction. What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependent upon performance is one of those circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed.
>
> "The very office of construction is to work out from what is expressly said and done what would have been said with regard to events not definitely before the minds of the parties if those events had been considered.
>
> "The foregoing analysis is believed to show that the result which has been reached by the courts on grounds of practical good sense falls in with the true theory of contracts under the common law."

Let us, therefore, endeavor to determine what the events are that are contemplated by the promises in these contracts, and reach the conclusion upon grounds of practical good sense.

First. As to the provision in respect to outside pressures.

As shown in our first brief, the responsibility of the contractor here is a continuing responsibility to keep up his bulkheads during the progress of the work as against the continuously destructive operation of wave action and weather. These are natural destructive agencies, always in force, the risk of which it is in every way reasonable that the contractor should take. They include also the outside pressure of the revetment on the timber bulkhead. This does not materially affect their character as natural agencies. The water pressure may be transmitted through the revetment if the revetment is sufficiently solid, but in any case both pressures operate in a manner so identical as to be indistinguishable, and both must therefore be met by a single responsibility.

Second. As to the provision in respect to inside pressures.

The inside pressure as to which the Government assumed the risk is due to purely artificial causes. It is the pressure of the fill against the bulkhead. There is a very clear and simple reason why the Philippine Government should have assumed this responsibility. As counsel for the Government has stated (p. 10), this work was done under plans specified by the Government and accepted by the contractor. The plan provided for a bulkhead of specific character and dimensions. It was not a case where the contractor agreed to deposit the fill, employing such bulkheads to protect it as he saw fit. The bulkhead was evidently experimental. There was a question whether it would be sufficient to support the fill. As a matter of fact, it

was shown by the events of the first of May that it was insufficient, and the plan of the structure was accordingly modified. It was for this reason, and this reason alone, that the Government assumed this responsibility. No other conceivable reason can be given for it.

It is contended in the respondent's brief that these two provisions of Article 5 constituted a limited insurance by direct covenant (p. 9), that they were simply a "division of responsibility for the breaks in the structure; that is to say, it contemplated that if the structure should fall one way, namely, outward, the Government should be liable for the repair of so much, while if it should fall the other way, namely, inward, the contractor should be liable for the repair of that much" (p. 4). The brief uses the strongest expressions to set forth this theory. It says that such was "the obvious meaning of the language of Article 5" (p. 4); it says that the division of responsibility was "arbitrary" (p. 4). It even eliminates from the situation the question of possible negligence by the statement (p. 11)—"Nor were these liabilities fixed with reference to any negligence, for negligence of either party might in any given case cause the break with which the contract charged the other party."

The respondent's theory is, therefore, one which ignores all possible explanations of the meaning of this provision as derived from the nature of contracts generally or from facts and circumstances of this contract disclosed by the complaint, and above all from the fact that the parties whose responsibilities it is sought to define stood in the relation of owner and builder in an ordinary contract of construction. The brief considers them

solely from the point of view of two insurers whose separate risks are defined by the paragraph.

Such is certainly not the meaning of the provisions. The responsibility of the Government and the responsibility of the contractor are not in the nature of an insurer's liability with which they are charged, irrespective of the acts of the parties and the circumstances of the occurrence. Suppose, for example, that in the case of a break in the bulkhead caused by pressure outwards, it turned out that the contractor had previously removed a part of the revetment, and that the fill exerting its pressure unopposed thereupon forced out the bulkhead. It is not to be assumed that in such a case the Government would be responsible.

On the other hand, suppose that the Government had desired to use a portion of the fill in another locality after it had been put in, and for that purpose had put a gang of men at work to remove it, so that the pressure of the waves and the revetment exerted their force upon the unsupported bulkhead and caused a break inwards. Certainly, in such a case as that the contractor would not be responsible.

An attempt, in the first case, on the part of the contractor to hold the Government liable, or an attempt, in the second case, on the part of the Government to hold the contractor liable under the covenants of Article 5, would be met at once by the principle that the contracting party under such circumstances cannot take advantage of his own breach of the contract. The conduct of the contractor in the one case and of the Government in the other, interfering with the performance of the contract, is an excuse to the opposite party for non-performance. This principle is sustained by a long line of cases of which United States v. Peck, 102 U. S., 64, is a familiar illustration.

It is doubtless to give expression to this limitation which the law in any case would impose that the clause is added at the end of Article 5, "provided that the specifications have been fully complied with," the meaning being that the responsibility shall be devolved upon one party or the other as laid down in the article, provided that the other party fulfills his obligations under the contract.

The above disposes effectually of the theory that the contractor was responsible for all injuries arising from pressure inwards and the Government for all injuries arising from pressure outwards, whatever may have been the acts of the other party.

To apply this reasoning to the facts of the present case: The Government, having been made by the contract (specification, par. 12) responsible for losses of dredged material due to failure of the bulkheads from pressure of the mud fill, found itself on the 18th of May, in this situation, namely, that owing to the break of the first of May, the mud fill back of the bulkhead had escaped and was still lacking. On the 18th of May, therefore, the bulkhead was without its inside support, and while in this condition the pressure of the revetment and the wave action destroyed it.

The absence of support from the inside, owing to the escape of the mud fill, is alleged in the complaint as one of the causes of the damage occurring on the 18th of May. It was not a remote cause. It was a concurrent cause. It was contemporaneous with the infliction of the damage. It was a condition that had existed previously and that still continued to exist. It was present at that moment, and it was a condition for which the Government was responsible.

The last paragraph of Article 12 of the specifications (Transcript, fol. 12) is in the nature of an interpretation of Article 5. It says:

> "All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, as stated in Article 5, will be measured as carefully as conditions will permit, and the computed amounts deducted from the statement for the final payment."

This exception expressly shows that the Government is responsible for all losses of dredged material due to failure of the bulkheads from pressure of the mud fill. Under these circumstances, it cannot be the intention that, where, owing to causes for which the contractor is not responsible, but the Government is, the sustaining mud fill has been removed from the rear of the bulkhead, the contractor shall still be treated as an insurer against any injury that may result from the action of the water.

II: THE QUESTION OF THE SUPPLEMENTAL AGREEMENTS.

Counsel for respondent on page 3 of his brief takes exception to our statement that the modifications made by the supplemental contract Exhibit D showed that the Government decided that its engineering plan was defective. He says "that there is no basis whatever for this suggestion. Not a scintilla of evidence or allegation exists in the record to that effect."

We beg to submit that in this statement counsel is in error. In the first place, the break of May 1st, as already explained, was due to a defective plan. It could be due to nothing else. The bulk-

head as designed with its supporting revetment was not strong enough to keep in the fill.

Secondly, the supplemental contract itself (Exhibit D) shows that the plan was defective, and that the Government so concluded. It states in terms (fol. 20) that "it has been found advantageous and *necessary* to modify the project" by the adoption of a different plan. If it was necessary to adopt a new plan to repair breaks obviously caused by the defects of the previous plan, there is no question that the previous plan was defective. It is not necessary that a specific allegation should be made in the complaint to this effect, *Res ipsa loquitur*. If the fact did not speak with sufficient certainty, the supplemental agreement does. This is also a part of the complaint.

Now, in repairing the break of May 1st and in restoring the material which had fallen out on that day, the new plan of construction was adopted. It was not a plan of construction called for by the contract. It was work for which a contract did not provide. It was provided for in the supplemental agreement Exhibit D only with reference to that portion of the work which Exhibit D covered. It was to be paid for under a new schedule.

We now come to the further contract contained in Exhibit E. The terms of this contract are defined, so far as they are defined at all, in Col. Fisk's letter of May 26th, quoting two telegrams, one from himself to the Commissioner, the other from the Commissioner to himself. Respondent's counsel seeks to draw unfavorable conclusions from two phrases in the first sentence of Col. Fisk's telegram as follows:

> "For most of typhoon damage I hold contractors responsible; they claim government

responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, etc."

Respondent's counsel (page 24) infers from the use of the word "wish" that the change in plan adopted in the supplemental contract, Exhibit D, was also adopted here at the instance of the contractor. Such a conclusion is not warranted by the language used. What the contractor "wished" was obviously to complete the structure and for that purpose to enter into some arrangement to do the work that the government had decided to have done, reserving the question of liability. It was not, as respondent's counsel suggests, that the contractor wished to do the work according to the new plan. The new plan was adopted by the government and the contractor wanted to finish his job.

Again, it is suggested that at this time the claim of the contractors was a claim on account of the delay in repairing the first break. Undoubtedly the question of delay entered into it then and enters into it as it is presented now. The complaint alleges that "the plaintiff proceeded as rapidly in the repairing of the said bulkhead and revetment as it was permitted to do by the officer in charge representing the defendant and in strict and immediate compliance with the orders received from said officer in charge in that behalf," and that thereafter, on the 18th of May, before the break was repaired, the second injuries occurred. It is clear that if the repairs had been made and completed before the 18th of May the second injury would not have occurred, and, therefore, in a secondary sense, they may have been said to be due to delay. The real

cause was the absence of the supporting fill behind the bulkhead and all that the question of delay means is that, if this condition for which the Government was responsible had been cured before the 18th of May, the damages would not have occurred. There is not necessarily any contradiction or even change in the attitude of the contractors as shown in Col. Fisk's correspondence and as shown in the complaint.

Obviously, however, the casual and abbreviated statement of Col. Fisk in his telegram cannot be taken as the precise definition of the basis of the contractor's claim, any more than his statement, that the contractors wish to do the work reserving the question of liability, can be taken as a request on the part of the contractors to change the plan. It would be difficult to find a contract which is expressed in terms more fragmentary and informal than that to be inferred from Fisk's telegram and Forbes's reply and the note which enclosed them. The contractors could hardly be bound either as to the foundation of their claim or as to their responsibility for change of plan in the work by the phrases used by Col. Fisk, or by any of Fisk's hasty recitals. The only recital in Fisk's telegram that seems of importance is that in which he states his own position or the position of the Government, where he says "For *most* of typhoon damage, I hold contractors responsible"; from which it is certainly a legitimate inference that for some part of the typhoon damage he did not hold the contractors responsible, although the Insular Court, ignoring this statement of Col. Fisk, denies the right to hold the Government responsible for anything.

III. AS TO THE PERFORMANCE OF WORK UNDER THE NEW PLAN.

The original contract adopted certain definite plans and specifications, according to which the work was to be done. It also contained the usual provision for changes to be made by supplemental agreements familiar in all Government contracts.

The first supplemental agreement of May 24 (Ex. D), providing for the injuries which took place on May 1st, devised a new plan for that work, stating that it was necessary so to modify the project. The second agreement of May 25th, providing for the repairs of the damage of May 18th, also adopted the new plan for that work, but reserved the question of the adjudication of liability.

One of the questions that was so reserved was the question whether the contractor was entitled to be paid for work done under the existing conditions which work was of a totally different character and plan from that provided for in the original specifications. We do not see any escape from this position. Whether the contractor would or would not be entitled to compensation if the specifications had not been changed is one question. Whether it would be entitled to compensation, in view of the fact that the specifications were changed, is quite another question; but both questions were reserved in the rough instrument which defined the terms of the contract. In fact all questions were reserved; and the complaint forms a complete basis for a recovery on the ground of the changed work, which is fully set forth, even though it should be found that on any other basis no cause of action existed.

The technical point raised in reference to the vagueness of the assignments of error is of no im-

portance, in view of the fact that this is a demurrer. To have stated the errors specifically would be impossible where the judgment was that the complaint with its accompanying contracts, specifications and other documents failed to state facts sufficient to constitute a cause of action.

Respectfully submitted,

JAMES RUSSELL SOLEY,
HOWARD C. DICKINSON,
Of Counsel for Appellant and
Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE ATLANTIC, GULF AND PACIFIC COMPANY, appellant and plaintiff in error,
v.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS. } No. 64.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

The facts are stated at length in the brief of plaintiff in error. Summarily they are as follows:

The plaintiff in error contracted to build in the harbor of Manila a rock and timber bulkhead and to fill in behind it with mud. The specifications which were incorporated into the contract contained the following clause:

DAMAGE TO BULKHEAD AND REVETMENT.

5. The contractor will be responsible for damages to the bulkhead and revetment

> arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with. (Fol. 10.)

Work was duly begun on August 1, 1905 (fols. 6, 2), and proceeded until May 1, 1906, when the pressure of the inside fill displaced about 200 feet of the bulkhead and rock revetment. Through this break a large quantity of the fill ran out (p. 2). It is not alleged that this break was due to any negligence on the part of the Government.

On May 18, 1906, "a severe typhoon" occurred, and 1,800 feet more of the bulkhead and revetment were destroyed "by the pressure of the rock revetment and the wind and waves from the outside acting against the bulkhead and revetment, which, because of the escape of the hitherto noted fill, was without support from the inside." (Complaint, Par. IV, p. 2.)

The complaint also alleges that if the break of May 1 had not occurred, then no damage would have been done by the typhoon of May 18. (Paragraph VII, p. 2.)

The Government has assumed responsibility to make good the break of May 1; and this action was brought to charge it with the responsibility to make good the break of May 18.

At page 5 of the plaintiff's statement of facts it is suggested that the modification of the plan for the repairs by Exhibit D (transcript, pp. 19–21) was due to a decision by the Government that its engineering plan was defective. There is no basis whatever for this suggestion. Not a scintilla of evidence or allegation exists in the record to that effect. On the contrary the contract itself (at fol. 7) provides for modification of the project irrespective of any fault of the parties.

The position of the plaintiff in error is in substance that the Government is liable under clause 5, above quoted, for all proximate and natural consequences of the break of May 1, and that the break of May 18 was one of these consequences.

The Government controverts both these positions.

FIRST.

The liability of the parties is wholly contractual; it is to be gathered from article 5 of the original specifications, under which there was contemplated a division of responsibility for repair of breaks in the structure, the Government to be responsible for repair of breaks from pressure inside out and the contractors for repair of breaks from pressure outside in; it is wholly independent of negligence or rules of tort liability; and it did not extend beyond the immediate responsibilities as placed by the contract.

Both courts below held that by this contract the government did not assume liability for all the proximate and natural damages which might follow a break

from pressure of the mud fill, but only for repair of the particular break in the structure, and that the Government particularly was not liable under this contract for the action of the typhoon, since that was one of the responsibilities expressly assumed by the contractor.

I.

The language of article 5 shows that the Government agreed to pay only for such repairs to the structure as should be directly necessitated by pressue of the mud fill.

The natural and obvious meaning of the language of article 5 is the imposition by the parties on themselves of an arbitrary division of responsibility for breaks in the structure; that is to say, it contemplated that if the structure should fall one way, namely, outward, the government should be liable for the repair of so much, while if it should fall the other way, namely, inward, the contractors should be liable for the repair of that much. Thus, while the government became liable to repair the break of May 1 made by mud pressure from within, the contractors became bound to repair the break of May 18 arising from pressure of the typhoon.

Such was the view of the Supreme Court below as is seen from the following language of its opinion:

> It being conceded that the Government was to pay for the damage to the breakwater on May 1, the question presented to us is, Who is to stand the consequences of the typhoon of May 18–19? As a general principle, in the absence of express agreement, the contractor

must bear the loss from destruction of work under way, even in case of unavoidable accident, the rule in this jurisdiction being expressed in article 1589 of the Civil Code as follows:

"If the contractor is obliged to furnish the material, he must suffer the loss in case of destruction of the work before delivery, unless delayed by the party who was to accept."

In this instance, however, the parties have not left their liabilities to the general principles of law, but have made their own rule, dividing the responsibility, so that while the contractor should remain answerable for all damage from outside pressure on the structure from wave and rock revetment, the Government assumed charge of repairing the breaks caused by pressure from the inside fill.

It is obvious that the liability of the government was so defined as to arise only with respect to breakage due to the *existence* of inside pressure, whereas the break for the repair of which plaintiff is now claiming was due, by plaintiff's own admission (Par. IV of the complaint, fol. 2) to the *nonexistence* of the inside pressure.

That liability on the part of the government was contemplated only in the case where the breach in the structure was due to the *existence* of the inside pressure is still further to be gathered from the last paragraph of article 12 of the specifications:

All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, *as stated*

> *in article 5*, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment.

Still further does the language of the instrument show the narrow limits of the Government's liability. It did not agree to be responsible for all kinds of damage and remote consequences; it undertook to pay merely for "repairs to the structure." In other words, this was not intended as an agreement to insure against the consequences of a break from inside pressure.

The courts below recognized that the liability of the government was subject to these limitations. In the opinion of the Supreme Court it was said (fol. 34):

> In support of this view of the subject, it must be borne in mind that the liability of the government is narrowed by two important limitations: First, it does not extend to all kinds of damage, but only to repairs of any break in the bulkhead; and second, to such a break only when resulting from pressure from within and not from lack of such pressure. This furnishes a strong suggestion that what the parties had in mind was not the remote consequence of a damaged structure, but rather the immediate repair of any break that might occur, thus looking separately to each particular break and its immediate cause.

Plaintiff contends (brief, p. 24) that the effect of article 5 is that the first branch of the clause is a general provision imposing responsibility on the contractor for certain contingencies therein named, while the second branch is a controlling exception paramount to the first and intended to impose liability on the Government not only for the contingency which it in terms states, but also for the concurrent happening of that contingency and those contemplated by the first branch. In other words, plaintiff would amend article 5 to read as follows:

> The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure [excepting that where this damage arising from wave action or from pressure of the revetment would not have occurred but for the nonexistence of inside pressure due to a break caused by pressure resulting from the mud fill, the repairs shall be paid for by the Government], etc., etc.

If anything like this had been intended, the parties would have said so.

The exception, it is said, is to be read into article 5 because the wave action is a normal and natural phenomenon while the inside pressure is an artificial manifestation. But just as truly is the "pressure of the revetment" also an artificial manifestation, and yet the contract itself has put it on the same plane with the wave action and not within the so-called "exception."

In truth, although we may admit that wave action is a natural phenomenon, the important thing is that the parties expressly provided for it in the contract; its naturalness thereupon ceased to be important in the construction of the contract.

We will admit that the breakage was caused by inside pressure *and* wave action. Plaintiff can not deny that—indeed, he admits it as well. But he attempts to show that "breakage caused by inside pressure *and* wave action" is just the same in this case as "breakage caused by inside pressure" alone, and bases his attempt on tort cases, bringing up the doctrine of proximate cause, and insurance cases elsewhere herein distinguished. The former are clearly irrelevant, for the reason that they involve what the reasonable man would foresee as the consequences of particular facts, whereas here the parties themselves had foreseen the consequences of these facts and provided for them and for reasons discussed elsewhere.

The contract and the obligations arising therefrom on the happening of the events of May 1 and May 18 were immediately thereafter understood by the parties themselves to have the effect herein contended for.

The contractors themselves so understood the situation. They claimed to hold the government "responsible for all [damage] *on account delay repairing first break.*" (See Exhibit E, fol. 23, telegram from Lieutenant-Colonel Fish to Commissioner Forbes of

May 25, 1906.) They thus, at that time, recognized the futility of basing any claim for this damage on the terms of the contract and sought to rely on a claim that the government was negligent in delaying the repairs to the first break. That claim of intervening negligence by the government having now been abandoned, they have shifted their ground to a claim under a strained construction of clause 5.

The Government from the first construed the clause as it was construed by the courts below. Lieutenant-Colonel Fisk, in his telegram of May 25, said: "For most of typhoon damage I hold contractors responsible."

II.

The division of liability by article 5 had no relation to any delinquency under the contract nor to any negligence, and therefore the responsibility for remote consequences as in such delinquencies does not here exist, but only for the particular consequences contracted against, as in cases of insurance.

The ordinary rule of natural and probable cause is founded on the idea that a breach of duty continues its injurious effect into all consequences which ought to have been foreseen, but in this contract the division of liabilities made by article 5 has no relation whatever to any breach of duty or to any obligation to foresee; and so that rule of legal cause is not to be attached to this agreement. Before proceeding to discuss the authorities upon this distinction, it is desirable to point out the character of this clause of the contract, as being a limited insurance by direct

covenant and not a responsibility founded at all upon any breach of duty.

The mud filling (for pressure of which the Government is charged) and the rock revetment (for pressure of which the contractor is charged) stand exactly in the same case, both being alike under plans specified by the government and accepted by the contractor, and both being alike the work of the contractors, supervised and accepted by the government.

Indeed, by article 4 of the specifications (fol. 10), the maintenance of both the inside pressure and the outside pressure is made the duty of the contractor—

> 4. The timber bulkhead will be reenforced with a riprap revetment placed against the outside and deposited in such a manner and at such times as will protect the structure against failure from pressure of the mud filling.
>
> The completed revetment will have an elevation of seven (7) feet above mean low water, with a width of five (5) feet at the top and an outside slope of three (3) horizontal to two (2) vertical.
>
> During the process of filling the space behind the bulkhead, the riprap must be deposited to the full width of the section and must at all times be slightly above the level of the inside fill until the specified section is obtained (fol. 10).

Yet notwithstanding these identities of the real responsibilities as between the government and the contractor for the mud fill and the rock revetment, article 5 provides that breaks by the pressure of the

mud fill are to be made good by the government, and breaks by the pressure of the rock revetment are to be made good by the contractor.

The liabilities fixed by article 5 were, therefore, not fixed with reference to any breach of contract, for they are not at all coincident with any breach; nor is any breach here alleged.

Nor were these liabilities fixed with reference to any negligence, for negligence of either party might in any given case cause the break with which the contract charged the other party. The complaint here does not allege any negligence by the government.

In other words, the duties of repair are based upon direct covenant and not upon any breach of duty by negligence or otherwise; they are self-imposed by the parties as distinguished from duties imposed by law upon breach of contract or upon a tort.

The sole question, therefore, is the construction of the covenant, and before liability can be fixed on the Government here it must be found that the Government has consented to it, *and consented to it in the extent demanded*. We are not concerned with the extent to which the law of breach of contract, or the law of torts, carries liabilities unless the covenant here has accepted those standards.

This distinction is put by Mr. Justice Holmes in "The Common Law" thus:

> The liabilities imposed by contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the

> wrongdoer to bear the loss occasioned by his act (p. 77). * * *
>
> As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary. What the event contemplated by the promise is—or, in other words, what will amount to a breach of contract—is a matter of interpretation and construction. What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependent upon performance is one of those circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed.
>
> The very office of construction is to work out from what is expressly said and done what would have been said with regard to events not definitely before the minds of the parties if those events had been considered.
>
> The foregoing analysis is believed to show that the result which has been reached by the courts on grounds of practical good sense falls in with the true theory of contracts under the common law (pp. 302–303).

The application of these guides by analogy to the present case is strong in favor of the Government, since here no question of the consequences attending a breach of contract is raised. We are concerned with the construction simply of an arbitrary covenant and the determination of the exact condition contemplated by it.

Did the Government then, by this contract, make itself in effect an insurer of the contractor against *all* consequences of pressure of the mud fill, even though such consequences directly resulted from a typhoon? To so hold would be to disregard the language of the contract and its effect of an arbitrary division of responsibility for specified consequences of accidental breaks to the structure. In this respect the case is to be distinguished from the general insurance cases cited by the plaintiff, where the insurer guarantees *all* damage consequent upon the event.

Upon such a question of construction of a contract a circumstance of first importance is, as Mr. Justice Holmes pointed out, the knowledge of the parties of what is dependent upon performance or upon contingencies expressly provided for. In this case the parties, having knowledge that the action of the waves or of the pressure from the revetment against the timber structure might enlarge an opening caused by the pressure of the mud fill, did not see fit to differentiate such a situation from any other operation of wave action. They contemplated that what they did provide should stand for all events touching breakage from wave action, pressure of the revetment or pressure from the inside fill; that is, the contractor should be liable for the former, the government for the latter, in any event.

That the parties actually foresaw that there might be losses of the mud fill, and hence a corresponding weakness of support to the bulkhead structure is clearly evident from article 12 of the specifications

which provides for the deduction from the statement for final payment of such amounts of the fill as should escape. Yet, to repeat, the parties did not change the terms fixing their responsibility; in the light of such foresight they still left the contractor responsible, with no exceptions or reservations, for breaks from outside pressure.

Looking at the question from another angle and distinguishing the case from those where the aim is simply to find the proximate cause of an unforeseen event, it is clear that the latter cases are not referred to with a clear understanding of their basis. The rule of proximate cause is applied in the usual case, where the actor has not, in fact, foreseen the consequences of his act at all, and he is held to those consequences only because he ought to have foreseen them as being a probable result of his action. But when at any point in the chain of cause and effect we reach a consequence actually foreseen and provided for by the parties before the event, the rule must cease and we are thrown on the agreement of the parties. So here, as the action of the typhoon was provided for by the contract, the rule ceases.

The principle and distinction are illustrated by the case of *Insurance Co.* v. *Transportation Co.* (12 Wall., 194), which is even stronger than the case at bar. A collision occurred at sea, causing a fire and a total loss. The total loss would not have occurred without the fire, but the fire would not have occurred without (and even was caused by) the collision. Nevertheless the insurer against fire was held liable

in spite of the fact that the proximate and natural cause of the damage, in the law of negligence, would have been not the fire but the collision. This the court said would still be the case, even if there had been a coinsurance against collision. So in the case at bar. The typhoon would not have damaged the wall without the preceding break from pressure of the mud fill; nor did the break from pressure of the mud fill damage the wall (that is the 1,800 feet) without the typhoon. The pressure of the mud fill here plays the part of the collision in the case cited, and the typhoon plays the part of the fire. Indeed our case is the clearer because the pressure of the mud fill did not *cause* the typhoon, whereas the collision did cause the fire and was therefore more plainly the proximate legal cause under the negligence rule.

In rendering the opinion in this case, Mr. Justice Strong said:

> There is, undoubtedly, difficulty in many cases attending the application of the maxim, but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss) the law will never regard an antecedent cause of that cause, or the *causa causans*. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time—when there are two concurrent causes of a loss—the predominating efficient one must be regarded as

> the proximate when the damage done by each can not be distinguished. Such is, in effect, Mr. Phillips's rule. And certainly that cause which set the other in motion and gave it its efficiency for harm at the time of the disaster must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire and that caused by the filling of the steamer are clearly distinguished.
>
> It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk against collision, and it is also true that the collision caused the fire; but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract (p. 199). * * * Suppose these underwriters had insured the steamer against collisions and fire and had them reinsured against fire alone, as they might have done; would it have been a sufficient answer to a suit brought by them against their insurers that the fire which caused the steamer to sink was itself caused by a collision? No one will affirm that (p. 200).

An interesting case presenting the very situation put by Mr. Justice Strong as his supposititious case in the passage quoted is that of *Fuller* v. *Detroit Fire and Marine Ins. Co.* (36 Fed., 470). A steamer was insured by one set of companies against marine risks

alone, by other companies against fire alone. She stranded upon a rock and settled somewhat. By reason of these events a fire arose and resulted in a complete destruction of the steamer and her machinery. The master ascertained the total loss, and then calculated the proportions to be borne by the marine companies and by the fire companies according to the respective effects of the stranding and the fire on the total loss. The fire companies insisted that the loss was wholly by a peril of the sea (namely, the stranding), while the marine companies insisted that it was mainly a fire loss. The court held that the companies were liable in the proportions found by the master, even though the whole set of events was started by the stranding.

The same reasoning, in essence, is the basis of the case of *Beakes* v. *Phoenix Insurance Co.* (143 N. Y., 402), where the liability of the insurer was for loss by lightning, with an express exception of loss by windstorm. It was shown that lightning had struck the buildings, that immediately a high wind came up, and that damage was done. The court held that it was error to charge the jury that they might hold the insurer against the lightning for the whole loss if they found that the prostration of the buildings by the wind was the effect of the lightning or if they found that the lightning was the primary cause, though the wind might have added to the extent of the damage. The court held that the jury should have apportioned the recovery in the ratio of the *direct* loss from lightning to the *direct* loss from wind.

The case of *Warmcastle* v. *Insurance Co.* (201 Pa. St., 302) presented precisely the same state of facts and precisely the same question. The court made the same ruling, and repudiated the suggestion that its decision should be changed "if the building was weakened by the lightning stroke, and thus rendered more susceptible to the effect of the wind."

So in our case it is immaterial that but for the break of May 1 the typhoon would not have done the damage. The fact remains, the typhoon was the efficient cause on May 18 and it was a peril the responsibility for which was cast on the contractor.

The three cases cited by counsel for the plaintiff in error are all distinguishable from this case and the *Transportation Co.* case, *supra*.

The *Kellogg* case (94 U. S., 469) (in which also the opinion was written by Mr. Justice Strong) was a negligence case, and therefore involved liability by law for all the consequences of the negligence.

In the *Boon* case (95 U. S., 117) (also an opinion by Mr. Justice Strong) the question was whether a fire set by a Union officer to keep records out of the hands of an imminent invading force was within an exception reading: "*Provided always*, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen to take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." Of course it was held that the exception applied. In order to bring this case into point with the case at bar, the contract would

have to be that A insured against fires set by Union troops in occupation and B insured against fires set by Confederates invading. If that had been the contract, the court would certainly not have held that B was liable on the facts stated.

The *G. R. Booth* case (171 U. S., 450) is distinguished plainly in the passage quoted in the brief of plaintiff in error (p. 16), where the basis of the decision is stated to be that the explosion and the inflow of the water were "concurrent," "without any appreciable interval of time," and the explosion was "the cause which set the water in motion." The converse principle of the distinction is stated by Mr. Justice Strong in the passage quoted above from the *Transportation Co.* case where he points out that "the causes succeed each other in order of time."

The *Transportation Co.* case and the other like cases above cited illustrate the clear-cut principle of law by which the application of the maxim, *In jure non remota causa sed proxima spectatur,* to insurance cases is differentiated from its application to cases of tort or breach of contract where the inquiry looks to the responsibility for a wrongful act. A well-considered note in 36 Am. St. Rep., 802, 807 (to the negligence case of *Gibson* v. *Delaware Co.*) puts this distinction exactly:

> The principle embodied in the maxim has been found useful in the solution of two distinct classes of cases: (1) Those which require the determination of the responsibility for a wrongful act, whether a ~~trust~~ or a breach of

> contract; and (2) those in which it is necessary to ascertain whether a catastrophe involving the loss of property, life, or bodily capacity has been caused by a peril the consequences of which have been assumed by an insurer. The fundamental difference between these classes is that in the latter the investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the former the object is to connect the circumstance which is the subject of the action with a responsible human will (p. 808). * * *
>
> The maxim *in jure non remota causa sed proxima spectatur* is applied in a much more literal sense to cases in which the liability of an insurer is to be ascertained than to those involving a breach of contract or a tort. If the nearest efficient cause of the loss is one of the perils insured against, the courts look no further. (*General Mut. Ins. Co.* v. *Sherwood*, 14 How., 35.; *Howard Fire Ins. Co.* v. *Norwich, etc., Transportation Co.*, 12 Wall., 194.)

The case of *General Mut. Ins. Co.* v. *Sherwood* cited in this note is interesting and instructive as affording an illustration of the application of the maxim to both insurance contracts and to torts.

The theoretical basis of this distinction is analyzed further in an article by Mr. Prescott Hall in 15 Harvard Law Review, 541, where, in quoting the above note, he says:

> We may now sum up what we have learned of proximate cause as follows: From a legal

> point of view it is of two kinds (1), as in insurance cases; (2) responsibility for a wrongful act, whether in tort or contract. * * *
>
> In other words, the doctrine takes two forms. The first is in the field of mechanism or necessity and in the time process. We regard the continuous stream of causation in question, and go upstream in our search until we find a spring which can properly be called its source. The question is one of fact; of adequacy to produce the result in a mechanical sense.
>
> In the other field we are dealing with teleology, with purpose, with a human will, actual or constructive, with a world of freedom, not of necessity.

To apply this analysis to the present case: We have the result—the break in the bulkhead of May 18. We examine the field of fact surrounding that result. We find the nearest efficient contributing cause to be the typhoon of May 18. Investigation thereupon ceases. The inquiry then is, Who is responsible for that cause? We turn to the contract and we find that the contractor is expressly made responsible.

The fallacy in carrying the investigation further back and ascribing the result to the break of May 1 is the precise fallacy that lies in confusing the insurance cases with the class of cases in which responsibility springs from a wrongful act, and so involves a question of delinquency in the actor, with an obligation imposed by law to make good all consequences of that delinquency.

To sum up: In this case each of the parties by covenant assumed responsibility for certain results of certain causes and not for all results of all consequences following from those causes; and the controlling rule of construction is exactly stated in *Phillips on Insurance*, page 1134, as follows:

> In every insurance the risk on each peril is liable to be affected by every other peril; and *the party*, whether insurer or insured, *at whose risk a peril is must bear the loss by such peril, though it may have been indirectly* and incidentally *enhanced by another, for which he is not answerable*, where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril. (The italics are the author's.)

SECOND.

Even if the government had undertaken responsibility for all loss caused by the first break within any legal rule of proximate cause, it would not be liable here, for the complaint affirmatively discloses an independent, intervening, efficient, and proximate cause, namely, a "severe typhoon."

Assuming for the purpose of argument that the government was liable here for all the consequences of the first break, as if it had caused that break by breach of contract or as a tort-feasor, or as an insurer against all such consequences, still this complaint charges no liability, for it alleges that there intervened a "severe typhoon," and such an intervention was the legal proximate cause within the well-recognized authorities, including those cited on the plaintiff's brief.

It may be that the court will take judicial notice, as urged by the plaintiff in error, of the fact that "typhoons" are ordinary in Manila Bay, but the allegation here is of an extraordinary typhoon—a "severe" one. Such extraordinary interventions are plainly independent controlling causes within the rule.

THIRD.

The so-called supplemental agreement, Exhibit E, merely permitted the repairs to be made in the modified manner, but reserved the responsibility for their cost to be determined under article 5.

The plaintiff in error finally urges that the complaint is to be construed as a demand for compensation not for repairing this damage under article 5 but for independent work under an alleged distinct new contract formed by Exhibits E and D.

No such point was made in either court below, and upon this record and these assignments of error it should not be considered here.

The assignments of error are not specific, as required by rule 35; and while the discretion of the court reserved by that rule might well be exercised to examine whether the courts below were in error in the construction which their opinions show they gave to article 5, the indulgence should not be extended in favor of a point not only not suggested by the assignments, but never before suggested in any court and nowhere apparent in the record.

But on the merits the point is not sound, even if consistent with the complaint.

Exhibit E expressly makes the liability of the government to pay at all for the new work contingent upon its liability to make the repairs under article 5. No other meaning can be given to that exhibit.

Col. Fisk's telegram said:

> Contractors * * * wish to make repairs in manner authorized for first break, leaving settlement of liability to be determined later. (Fol. 22.)

and Commissioner Forbes replied:

> Governor-General and I approve authorizing contractors to proceed immediately to make repairs on lines indicated *with the understanding that all rights reserved in regard to adjudication of liabilities.*

The correspondence making up this Exhibit E is meaningless excepting on the theory that the contractors were to do the work in the way they "wished," but were not to be paid if the burden of repair was on them by virtue of article 5.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney-General.

NOVEMBER, 1910.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE ATLANTIC, GULF AND PACIFIC COMPANY, appellant and plaintiff in error,
v.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.
No. 64.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF FOR THE GOVERNMENT OF THE PHILIPPINE ISLANDS, FILED PURSUANT TO LEAVE GRANTED ON THE ARGUMENT.

I.

The following additional authorities are referred to in support of the Government's main proposition that, as the break of May 28 was due directly to wave action and pressure of the revetment, and as those specific causes are charged upon the contractors by the express terms of the contract, no further inquiry into prior contributing causes can be had.

Dudgeon v. *Pembroke*, L. R., 2 App. Cas., 284, 297; same case below in L. R. 9 Q. B., 581, 595.

68576—10

Wilson v. "*The Xantho*," L. R. 12 App. Cas., 503, 509, 511, 514.

Insurance Co. v. *Adams*, 123 U. S., 67.

Liverpool Steam Co. v. *Phoenix Insurance Co.*, 129 U. S., 397 at p. 438.

Northwest Transportation Co. v. *Ins. Co.*, 41 F. R., 793, 800 (C. C.).

2 *Arnould on Marine Insurance* (6 ed.), pp. 737, 753.

Hildyard, Marine Insurance, p. 269.

Phillips on Insurance, secs. 1136, 1137, in connection with sec. 1134, quoted at p. 22 of the principal brief.

In the Dudgeon case Lord Penzance stated the rule in a nutshell:

> A long course of decisions in the courts of this country has established that "*causa proxima et non remota spectatur*" is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it (p. 297);

and in the same case below Blackburn, J. (who also participated in the decision above), analyzed the facts in a manner equally applicable to the case at bar:

> It would be difficult to find a better example of what Lord Bacon calls the infinity of the "causes of causes, and their impulsion one on the other," than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going

> ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz, her being in distress and full of water, was, that when she labored in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss. (L. R. 9 Q. B., p. 514.)

II.

The point made by counsel for the plaintiff in his argument in reply, that in *Insurance Co.* v. *Transportation Co.* (12 Wall., 194), the risk of collision was on the shipowner, is exactly the fact that makes the case decisive here.

The insurer there was held liable for the loss from fire, even though the fire was caused by a collision, which was at the risk of the owner; and so it must be held here that the contractor is liable for the loss from wave pressure, even though that wave pressure should have been contributed to by the secondary effects of the mud pressure, which was at the risk of the Government.

III.

Finally, the fact must not be overlooked that the Government was not a full insurer against *all* effects of mud pressure, but only against specified effects, "the repairs to the structure" from "a break caused by *pressure resulting from the mud fill.*"

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney General.

DECEMBER 7, 1910.

O

for a public work with the Government of the Philippine Islands, are stated in the opinion.

Mr. James Russell Soley, with whom *Mr. H. C. Dickinson* was on the brief, for appellant and plaintiff in error:

A demurrer should not be sustained if, upon any fair and liberal interpretation, a cause of action can be implied from the averments of the complaint. *Lockhart* v. *Leeds*, 195 U. S. 427, 435; *Swift & Co.* v. *United States*, 196 U. S. 375, 395; *Coatsworth* v. *Lehigh Valley R. Co.*, 156 N. Y. 451, 457; *Olcott* v. *Carroll*, 39 N. Y. 436; *Naylor* v. *N. Y. C. & H. R. R. R. Co.*, 119 App. Div. 22, 28; *People* v. *New York*, 28 Barb. 240, 248; *Ketchum* v. *Van Dusen*, 11 App. Div. 332.

Plaintiff has pleaded a series of averments from which a cause of action may be clearly inferred. Even if freely admitted that the pleading is inartificially drawn and in some points is obscure and contains apparent contradictions, it clearly appears that the work which was the subject of this contract suffered serious injury by reason of the pressure of the fill upon the enclosing bulkhead and under the terms of the contract, the defendant, the Government of the Philippine Islands, was required to pay for the repairs to the structure so caused and that the work was done at reasonable and proper prices.

The break of May 1, 1906, due to the pressure of the fill upon the enclosing bulkhead, was the proximate cause of the subsequent injury to the work, for the repair of which compensation is demanded in the complaint.

The question here is that of proximate cause and the pressure of the fill is distinctly pleaded as the proximate cause of the injuries both of May 18–19 and of May 1. *Mil. & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 474; *Insurance Co.* v. *Boon*, 95 U. S. 117, 130; *Insurance Co.* v. *Tweed*, 7 Wall. 44; *The G. R. Booth*, 171 U. S. 450, 460.

The court will take judicial notice of familiar natural

phenomena and of natural laws which are matters of general knowledge, such as those of meteorology, physical geography, wave action and the prevalent liability to typhoons in the waters surrounding the Philippine archipelago, and known climatic conditions. *McGhee Irrigating Ditch Co.* v. *Hudson*, 21 S. W. Rep. 125; *The Conqueror*, 166 U. S. 110, 134. The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance. See *Insurance Co.* v. *Boon*, *supra*.

The liability of the defendant is not affected by paragraph 5 of the specifications.

The responsibility of the contractor for damages, arising from wave action as an independent cause, so far as it is based on paragraph 5 of the specifications, is expressly limited to certain specific forms of damage, and leaves the responsibility for other resultant damages subject to the general rule.

The supplemental agreements constitute an important additional support for plaintiff's cause of action.

The question of ambiguity is in the contract, and not in the pleading.

If the provisions of the contract are ambiguous and require interpretation they cannot be settled by demurrer. If failure to state a cause of action is due in any respect to latent ambiguities in the contract, plaintiff can introduce evidence to remove these ambiguities. *Clay* v. *Field*, 138 U. S. 464, 480.

Plaintiff cannot be deprived of the right to show whether he has a cause of action or not.

Mr. Assistant Attorney General Denison for the appellee, and defendant in error:

As the break of May 28 was due directly to wave action and pressure of the revetment, and as those specific causes are charged upon the contractors by the express terms of the contract, no further inquiry into prior contributing

causes can be had. *Dudgeon* v. *Pembroke*, L. R. 2 App. Cas. 284, 297; *S. C.*, L. R. 9 Q. B. 581, 595; *Wilson* v. *The Xantho*, L. R. 12 App. Cas. 503, 509; *Insurance Co.* v. *Adams*, 123 U. S. 67; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438; *Northwest Transp. Co.* v. *Insurance Co.*, 41 Fed. Rep. 793, 800; 2 Arnould on Mar. Ins., 6th ed., 737, 753; Hildyard, Mar. Ins. 269.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a contract for an extension to the Luneta of the city of Manila. Both courts below decided for the Government, the defendant, upon demurrer to the complaint. Abridged, the allegations are these: A contract for the work was made on July 24, 1905. On May 1, 1906, about 200 feet of bulkhead and rock revetment were displaced by pressure from the inside fill and moved about twenty feet into the Bay of Manila, so that a large quantity of the fill that had been pumped behind the bulkhead escaped into the bay. On May 18, before the break could be repaired, a severe typhoon occurred, and the bulkhead and rock revetment, being without the support of the inside fill, were destroyed for about 1800 feet by the pressure of the rock revetment and the wind and waves from the outside, and a large additional quantity of the inside fill escaped. The question is which party must bear the last-mentioned loss. If the first break had not happened no damage would have been done by the typhoon. The plaintiff sets forth the cost of repairing the damages of May 18 and seeks to recover it in this suit.

The specifications of the contract contain the following:

"5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from

the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with."

"12. . . . All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill as stated in Article 5, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment."

On May 24 a supplemental contract was signed. It recited that the repairs made necessary by the break of May 1 ought to be paid for by the Government; that the original project was modified so as to fill the space that had given way with rock, with clay, etc., for the interstices; and that the change would either increase or diminish the cost. It then agreed that the plaintiff should make the repairs and the Government would pay the actual and reasonable cost, with certain qualifications, plus fifteen per centum, which last was to cover all other items, including profit. This referred to the first damage only. On the next day, May 25, the Government director telegraphed to Commissioner Forbes "For most of typhoon damage I hold contractors responsible; they claim Government responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement . . . do not see how contractors can be authorized proceed before determination of liability." The answer approved "authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities." These telegrams were communicated to the plaintiff, and it was authorized to proceed to make repairs in the manner outlined in the agree-

ment of May 24. It did so and the Government now refuses to pay.

It will be understood that this case is in no way concerned with the possible difference in cost between the mode of repair adopted and that which might have been followed under the original contract. The question here is which party is responsible for the repairs, assuming no such difference to exist. We need not consider whether the effect of all that we have recited was or was not to substitute the new mode and new cost for the old as that which the parties left at risk when they agreed that the plaintiffs should go on and do the work. If the plaintiff should have any claim for the excess alone, if any, over the cost that would have been incurred under the original plan it is not suing for it here.

Both sides found their case on the division of losses made by the specification quoted. On the one hand, the accident would not have happened but for the pressure from the mud fill, on the other, the more immediate cause was wave action and the pressure of the revetment against the timber structure, the effects of which the contractor was to bear. We agree with the court below that the contractor must bear the loss. The question is not whether the responsibility of the Government might not have extended to the later consequences had it originally been a wrongdoer, and had it been sued in tort. The question is to what extent did the Government assume a risk which, but for the contract, would not have fallen upon it at all. The contract qualified the relation only cautiously and in part. If the break was caused by pressure from the mud fill the Government agreed to pay for repairs to the structure. That was all.

But for the addition in 12 quoted above it might be doubted whether 'structure' meant anything but the bulkhead and revetment. But Article 12 extends the Government liability to loss of dredged materials due to

such a break. It is suggested that the reason for the Government undertaking was that the plan was made by the Government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the Government, was doing the work, and it took the risk so far as the contract did not make a change. The Government could not be charged by it with negligence or with causing the first break. That was only something for repairing which the Government had promised to pay. Whatever the Government had not promised to pay for the contractor had to do in order to offer the completed work which it had agreed to furnish. The case is stronger for the Government than those upon policies of insurance where courts refuse to look behind the immediate cause to remoter negligence of the insured. *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 366; *Orient Insurance Co.* v. *Adams*, 123 U. S. 67; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284, 295. Here, as we have said, the plaintiff cannot charge the defendant with negligence, the immediate event was one of which the plaintiff took the risk, on general principles of contract it took that risk unless it was agreed otherwise, and it does not matter to the result whether we say that we cannot look farther back than the immediate cause, or that the undertaking of the Government did not extend to ulterior consequences, not specified, of the break for repairing which it undertook to pay, but which it did not cause.

Judgment affirmed.